In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL Surety Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondent's brief has raised several new issues.

1. Respondent argues (Br., pp. 1–3) that the Circuit Court of Appeals had no jurisdiction in this case for the reason that the appeal by the Collector was not taken from a final decision of the District Court. Reliance is placed on *Shumaker* v. *Life Insurance Co.*, 159 Fed. 112 (C.C.A. 3d).

That case has no application here. It merely holds that the appellate jurisdiction of the Circuit Court of Appeals is limited by Section 128 (a) of

the Judicial Code (U.S.C., Title 28, Sec. 225) to a review of final decisions, and since the appeal there was from an interlocutory order discharging a rule for judgment, which was not a final decision, the court had no jurisdiction. Here the appeal was taken not from an interlocutory order but from a final judgment. (R. 17.)

The affidavit of defense filed in this case raised a single question of law, namely, that failure to timely substitute succeeding Collectors abated not only the prior pending suit but destroyed the cause of action as well. As stated by the District Court (R. 12):

> The only question raised by this affidavit of defense is whether the cause of action is abated, the affidavit of defense being the statutory equivalent of a plea in abatement.

The court ruled in defendant's favor, holding that the cause of action had abated. This disposed of the whole of the Collector's claim and ended the case so far as any further proceedings by the Collector in the District Court were concerned. Accordingly, unlike the *Shumaker case, supra,* where the District Court merely ordered that "The rule for judgment is therefore discharged" (see opinion District Court, 153 Fed. 332, 355), the court entered final judgment for the defendant. (R. 14.) The judgment was clearly reviewable by the Circuit Court of Appeals under Section 128 (a) of the Judicial Code, *supra.* Cf. *Riling* v. *Idell,* 291 Pa. 472, 476.

2. Respondent argues (Br. pp. 3–4) that the appeal to the Circuit Court of Appeals in this case was from a consent judgment and that under the rule of *United States* v. *Babbitt*, 104 U.S. 767, no appeal lies from such a judgment. But the appeal in this case was not taken from a consent judgment but from the considered judgment of the District Court. In the *Babbitt case, supra*, the lower court in an elaborate opinion had held that the claimant there could not recover, yet after this decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney General, in favor of the claimant. Here the United States Attorney's praecipe for judgment (R. 14) was merely a request for judgment pursuant to and "in accordance with the opinion" previously filed. There was no waiver of errors. It was proper under the circumstances to request the entry of final judgment, since the court's opinion disposed of the whole of the Collector's case and left no room for further proceedings by the Government in the District Court.

The United States Attorney advises that the respondent urged both of the above jurisdictional points upon the Circuit Court of Appeals; but the court took no cognizance of either one, assumed jurisdiction, and decided in the respondent's favor on the merits.

3. Respondent argues (Br. pp. 5–9) that the present petitioner has no standing in this case because the respondent was not notified of the substi-

tution of Ladner for MacLaughlin in the District Court, or of the substitution of Fix for Ladner in this Court, and was not given an opportunity to present an objection. What this objection could have been is not apparent. Respondent relies on Section 11 (c) of the Act of February 13, 1925, which provides (U.S.C., Title 28, Sec. 780):

> (c) Before a substitution under this section is made, *the party or officer to be affected*, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (Italics ours.)

This provision appeared for the first time in the 1925 amendment to the original Act of 1899. It merely provided for consent of the succeeding officer, who would be affected by the substitution. The words "party or officer to be affected" refer to the incumbent in office, not to the adverse party to the proceedings. This is apparent from the hearings before the subcommittee of the Senate Committee on the Judiciary (U.S. Senate, 68th Congress, Second Session, S. 2060, No. 84446), where the purpose of the 1925 amendment was explained as follows (p. 16):

> Paragraph (c) adds a new feature by requiring that notice of the application for such substitution and an opportunity to be heard in objection thereto shall be given *the incumbent of the office,* unless he has ex-

> pressly consented to the substitution. (Italics ours.)

This is also shown from the House Report on the amendment (House Report 1075, 68th Congress, Second Session, page 7), in which it was stated—

> Under this provision, the new State, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice.

That the statute requires only the consent of the incumbent in office was recognized by this Court in *Ex parte LaPrade*, 289 U.S. 444, where it was said (pp. 454, 458):

> The section requires that the officer, unless expressly consenting thereto, be given reasonable notice of the application and an opportunity to present any objection which he may have (p. 454).
>
> * * * * *
>
> Subdivision (c) extends to all cases covered by (a) and (b). It merely requires that before substitution a nonconsenting officer shall be given notice and opportunity to object (p. 458).

Thus it seems clear that notice to the respondent herein was not a prerequisite to a substitution under the statute.

The suggestion in respondent's brief, page 6, that the District Court did not even pass upon the first substitution is clearly erroneous. (See footnote 1, page 4 of our original brief.) The appeal was taken in the name of Ladner (R. 17), and the

proceedings were conducted in his name in the Circuit Court of Appeals. (R. 18 19.) Later the judgment of the District Court was amended so as to run against him and the amended judgment was incorporated in the record pursuant to stipulation of counsel. (R. 21 23.)

Moreover, as shown from the letter of the United States Attorney, appearing in the Appendix hereto, counsel for respondent was specifically notified of the suggestion of the death of MacLaughlin and the request for substitution of Ladner as plaintiff. In spite of this notice received on July 19, 1932, respondent made no objection to the petition for appeal filed September 14, 1932 (R. 17), but, on the other hand, by stipulation filed June 6, 1933, consented to incorporation of the amended judgment in the transcript of record. Had respondent any objections to the substitution, it seems altogether clear that his subsequent actions constituted a waiver thereof.

4. Under his point III the respondent makes the statement (Br. p. 9) that—

> The petitioner argues from this that the sole purpose of the Abatement Act was to permit the continuance of mandamus and habeas corpus proceedings, which by their nature must be suits *against* public officials.

This is not our position. While the Act of 1899 was undoubtedly inspired by the opinion of this Court in *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600, which was a mandamus pro-

ceeding, nevertheless the scope of the Act, certainly of the 1925 amendment, was extended to include any "action, suit, or other proceeding brought by or against an officer of the United States." The hearings before the Subcommittee of the Committee on the Judiciary on the 1925 amendment show that the scope of the Act was enlarged to cover all cases of this kind. There it was said (p. 16)

> The provision for substitution applies only to suits relating to the present or future discharge by the officer in his official duties. Such suits, unless falling within the limited class defined in the act of 1899, must in many instances be dismissed, sometimes after reaching the Supreme Court, because of the expiration of the term for which the officer was elected or appointed, or of his otherwise vacating the office. Where the officer's term is for one or even two years, it is practically impossible within that period for him or one suing him in his official capacity, to prosecute a suit involving the assertion of a Federal right to the exhaustion of appellate review. The Supreme Court is, in consequence, debarred from passing upon many important Federal claims which in other cases would come before it and be disposed of in ordinary course. Adequate relief against this inequitable situation will, it is believed, be afforded litigants in such cases by the provisions of this section. It will be noted, however, that the provision for sub-

> stitution is not mandatory, but leaves it to the sound discretion of the Court to determine whether there is a substantial need for continuing the cause and obtaining an adjudication of the questions involved.

It will be noted from the above quotation that the provision is not mandatory, and supports *Ex parte LaPrade*, 289 U.S. 444, and *Brown-Crummer Co.* v. *City of Florala*, 55 F. (2d) 238 (M.D. Ala.), to that effect. Since it is not a mandatory but a remedial provision, it is difficult to see how it can abolish a cause of action that would normally survive.

United States ex rel. Claussen v. *Curran*, 276 U.S. 590, *LeCrone* v. *McAdoo*, 253 U.S. 217, and *Kuttroff* v. *Sutherland*, 49 F. (2d) 944 (S.D.N.Y.), do not stand for the proposition that failure to substitute within time abolishes the cause of action. They merely hold that the instant suit is abated. Cf. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, cited at p. 15 of our original brief. In that case a new petition for habeas corpus was filed and the case eventually reached this Court, the question involved being there decided on the merits.

Respondent does not seriously contend that the cause of action, being *ex contractu*, does not survive the death of the original obligee. *Bowers* v. *American Surety Co.*, 30 F. (2d) 244 (C.C.A. 2d), specifically holds that such action does survive to the succeeding collectors in office. In fact, the District

Court admitted that the cause of action survived, and the cases cited on p. 14 of our brief establish the general proposition that actions *ex contractu,* as distinguished from actions *ex delicto,* do survive, and that abatement of a former suit constitutes no bar to the bringing of a new action. The right to bring a new suit where the cause of action survives continues as a matter of right, and does not depend upon the Abatement Act here involved. *Benson* v. *Crain,* 91 Vt. 44, cited by respondent (Br. p. 15), is not to the contrary. There, as stated in the opinion, "The question for decision relates to the survival, or perhaps, more accurately speaking, to the revivability, of a suit that would abate at common law."

The six-months' time limit provided for in the Act was merely a time limitation upon the right to continue a present suit. It constituted no time limit on the right to bring a new suit where the cause of action survived, but in the words of the Act, "it shall be *competent* for the court wherein the action, suit, or proceeding is pending * * * to *permit* the cause to be continued and maintained by or against the successor in office", (italics ours); and in construing this language this Court in the *LaPrade case,* at page 458, said: "The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered." We submit that in the face of the

plain language of the Act and its meaning as declared by this Court, the respondent's contention that the Act is mandatory is utterly unfounded.

Respectfully submitted.

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Solicitor General.
SEWALL KEY,
J. P. JACKSON,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

NOVEMBER 1933.

APPENDIX

Our File No. 10870-2

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY,
EASTERN DISTRICT OF PENNSYLVANIA,
Philadelphia, November 14, 1933.

SOLICITOR GENERAL,
Washington, D.C.

Re *Alvin F. Fix* v. *Phila. Barge Company et al.*

SIR: Please be advised that on July 19, 1932, this office notified Thomas P. Mikell, of the firm of Saul, Ewing, Remick, and Saul, that we had filed suggestion of death of Joseph S. McLaughlin and request for substitution of Albert H. Ladner as plaintiff.

Respectfully,

CHARLES D. MCAVOY,
United States Attorney.

T.J.C.: M.R.
Mr. CURTIN.

U. S. GOVERNMENT PRINTING OFFICE: 1933